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THE DOCTRINE OF ENTIRETY IN JUDGMENTS.

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BY JAMES T. RINGGOLD, ESQ.

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THE common law, as interpreted and administered in the United States, contains anomalies of two kinds—those which were reasonable enough when they were adopted but which have survived their usefulness, and those which never were sustained by sound legal reason, but originated in some careless or ill-considered expression of a court. Many instances of both might be pointed out, but the general progress is undoubtedly towards their elimination, and the squaring of our jurisprudence with the principles of logic and common sense, regardless of technicalities. This progress is, however, so seldom accelerated by the mere force of logic alone, and so often depends entirely on slow judicial accretions, that we may be pardoned for calling attention to an instance in which a perceptible advance in the right direction was made in American law through the direct influence of this magazine, and of an able writer whose forcible exposition of a fallacious assumption of the courts first appeared in these pages. The question discussed was as follows :

*A judgment is rendered—mistakenly or irregularly—against two defendants, one of whom was not summoned, and it is allowed to stand unreversed: Is it void as against the summoned defendant? Can he be sued on it in another State?*<sup>1</sup>

The Supreme Court of Massachusetts, in *Hall v. Williams*,<sup>2</sup> pronounced as law a certain doctrine as to judgments, which has been followed in that State and in three others, but which is inconsistent with some earlier and a good many later decisions, and is not now accepted as law by the two text-writers on judgments, Messrs. A. C. FREEMAN and H. C. BLACK. Judgment was recovered in the Superior Court of Chatham County, Georgia, against two defendants, only one of whom had been summoned, and when an action of debt on the judgment was brought in Massachusetts, the Supreme Court of that State held that "the judgment being entire, if it is a nullity with respect to one, it is also in the whole," and that the summoned defendant had therefore a good defense in the fact that his co-defendant had not been summoned. This case was followed in Massachusetts,<sup>3</sup> Maine and New Hampshire, and the doctrine was stated as the law in the first three editions of *Freeman on Judgments*: "A judgment rendered against persons jointly liable is an entirety, and if void as to one defendant, is void as to all. If, in an action on a judgment against several joint defendants, it appears that one of them was never served with process, the judgment is considered as a nullity even against the others." (Second edition, § 136.) In the *American Law Register* for November, 1880, pages 673-690, this doctrine

<sup>1</sup> Mistakenly or irregularly rendered. In some States there are statutes authorizing judgments against two or more joint debtors upon service of summons on but one, but the discussion may more profitably be confined to cases of judgments irregularly rendered and without statutory sanction.

<sup>2</sup> 6 Pick., 232 (1828).

<sup>3</sup> At one time the decisions in that State seemed to indicate a readiness to depart from the case of *Hall v. Williams*—see in particular *Stockwell v. McCracken*, 109 Mass., 84—but the doctrine was reaffirmed later without qualification.

was criticized in an article by Mr. FREDERICK J. BROWN, of Baltimore, and in 1882 Mr. FREEMAN, in a long and careful note published in the 32d volume of his "American Decisions," at page 604, emphatically rejected the doctrine of *Hall v. Williams*. In 1883 the Court of Appeals of Maryland, in *Hanley v. Donoghue*,<sup>1</sup> followed the "entirety" doctrine, relying on the New England cases, and in 1885, that case having been taken up to the Supreme Court of the United States—on the "full faith and credit" clause of the Constitution—the decision of the Maryland court was reversed, *Hanley v. Donoghue*, 116 U. S., 1, but the Supreme Court (Justice GRAY delivering the opinion) avoided any mention of the "entirety" doctrine. Mr. BLACK, in his recent work on Judgments (published in 1891) at § 211, expresses disapproval of that doctrine, as does Mr. FREEMAN again in the 4th edition of his work on Judgments (1892), § 136, where he says that the utterance in *Hall v. Williams* was a *dictum*, and that "the decided preponderance of authorities maintains that a judgment against two or more is not void as against those of whom the court had jurisdiction, though void as against others." The learned author points out, at § 557, that the question was "first carefully considered and explained" in the *American Law Register's* article, and says that "at the present time the weight of authorities is in conformity with the conclusions reached in this article."

Those members of the profession who have not the *American Decisions'* series within reach may be interested to read the following discussion of the question in Mr. FREEMAN'S vigorous note in the 32d volume of that series. It follows in large part the authorities cited in the *Law Register's* article, which begin with *Motteux v. St. Aubin*,<sup>2</sup> believed to be the earliest decision, that a judgment against two defendants, voidable or void as to one of them, may yet stand good as against the other, the first American case cited as adopting this authority being

<sup>1</sup> 59 Md., 239.

<sup>2</sup> 2 W. Bl., 1133 (1777).

Gerard *v.* Basse, in the Court of Common Pleas, Philadelphia.<sup>1</sup>

Mr. FREEMAN, after mentioning "that line of authorities which assert and enforce the proposition that a judgment is an entirety, and if void as against one defendant is void as against all," says: "This proposition has certainly been accepted and applied by very eminent judges. We propose to examine the cases in which it has been distinctly announced, and examine its foundations for the purpose of ascertaining whether they are sound either in precedent or in principle. We believe the first case upon this subject is that of *Hall v. Williams*. . . . This question was very summarily dealt with. 'The judgment being entire, if it is a nullity with respect to one it is also in the whole.' This is all the court thought proper to say upon the subject; and it is the substance of everything which has been said from that time down to the present. For authority, the court relied upon *Richards v. Walton*.<sup>2</sup> Now, this case of *Richards v. Walton* did not involve any similar question. Nor did the court volunteer any opinion upon the subject of void judgments. The court merely determined that a judgment, when reviewed upon certiorari, must be affirmed or reversed as a whole, and cannot be affirmed in part and reversed in part. We know of nothing which has caused so much confusion and misapprehension as the failure to discriminate between voidable and void proceedings—between those proceedings which result from an erroneous exercise of jurisdiction, and those which take place in the absence of any jurisdiction whatever. Every lawyer knows, or at least ought to know, that the existence of errors which demand the reversal of a judgment upon appeal or writ of error, by no means warrants the treatment of such a judgment as void. Yet in *Hall v. Williams* a judgment was deemed void *in toto* when sued upon as a cause of action, for no other reason than because it would have been reversed *in toto* had any appeal been taken. . . . If,

<sup>1</sup> 1 Dallas, 119 (1784).

<sup>2</sup> 12 Johns., 434.

as we think, *Hall v. Williams* and all the subsequent cases in harmony with it upon this subject, rest upon *Richards v. Walton*, and *Richards v. Walton* is no authority either way, then so far as authority is concerned, we think there is substantially none in favor of the position that a judgment void as to one defendant is necessarily void as to all. If the court in Massachusetts really desired to seek advice from those in New York, it might have there found decisions directly in point," etc.

Mr. FREEMAN then cites some of the New York cases, and also *Motteux v. St. Aubin*, *supra*, *Gerard v. Basse*, *supra*, *Silvers v. Reynolds*,<sup>1</sup> and other cases mentioned in the *Law Register's* article; and also cases not mentioned there.

. . . "The authorities heretofore cited show that the courts of Massachusetts, Maine and New Hampshire are fully and perhaps unalterably committed to the doctrine that a judgment is an entirety, and if void against one of the defendants is void as to all. . . . We believe it to be without any other support than the authority of those eminent courts, which, through what we conceive to be either a misapprehension of a prior decision, or of the real nature of the question in issue, pronounced in its favor. We say misapprehension of the question in issue, because the court seemed to treat it as a mere question of error, and not of power, and to assume that if error was shown the judgment was void.

. . . "The argument upon one side of this subject is usually expressed substantially as follows: 'The judgment is entire, and if void as to one defendant, where there are several, it is void as to all.' . . . This sentence is terse, perspicuous and dogmatic. But is it logical? Is there anything in a judgment which necessarily prevents its being enforced against one defendant without affecting the others? Is there any such personal unity of judgment debtors as pertains to tenants by the entireties, each of whom is incapable of acting without the other? There certainly is not."

<sup>1</sup> 2 Harr. (N. J.), 275.

The Maryland decision which the plaintiffs took up to the Supreme Court, was a case where judgment had been rendered in the Court of Common Pleas, Washington County, Pennsylvania, against A who had been summoned, and B who had not, in an action for breach of covenant, and action of debt on judgment was brought in Maryland against A. It turned mainly upon the "entirety" doctrine as laid down in *Hall v. Williams* and the later New England cases—the Maryland Court of Appeals holding that doctrine to be sound, and deciding in favor of the defendant *because* they so held—and the arguments of counsel had been for the most part devoted to attacking or defending that doctrine. See the report of the case in 59th Md., 239, and the citation of authorities, among them of course Mr. FREEMAN'S very emphatic note in 32d American Decisions, then recently published. There was, to be sure, one other point in the case as it was presented to the Maryland court, the point raised by the first count of the plaintiffs' declaration,<sup>1</sup> but when this was decided against them by the Court of Appeals, as the decision on this point did not raise a federal question, the point was not argued before the Supreme Court, and was—properly—not considered by them.<sup>2</sup> In the Supreme Court the argument of counsel was devoted exclusively to the soundness or unsoundness of the "entirety" doctrine, the only question left in the case, apparently, and of course the cases of *Knapp v. Abell*,<sup>3</sup> and *Wright v. Andrews*,<sup>4</sup> in both of which Judge GRAY

<sup>1</sup> See page 245 of 59th Md.

<sup>2</sup> This point was as follows: Plaintiffs in their first count, demurred to, declared as on a normal and regular judgment of the Pennsylvania court—that is, *as if* both defendants had been summoned. They relied upon *Blake v. Burley*, 9 Iowa, 592, in support of the position that one of two defendants in a judgment recovered (a normal and regular judgment) may be sued alone—that it is the several obligation of each, as well as the joint obligation of both. In deciding this point against appellants, the Maryland court said, rather carelessly, that "both were jointly and severally liable on the judgments" [judgment]. The court evidently meant that both defendants were jointly, but neither of them was severally, liable on such a judgment.

<sup>3</sup> 10 Allen, 485 (1865).

<sup>4</sup> 130 Mass., 149 (1881).

had delivered the opinion of the court, were among the authorities cited.

Never, one would think, was a judge more directly confronted with a line of decisions of his own State, than was Mr. Justice GRAY on this occasion. We can hardly come to any other conclusion than that the failure of the Supreme Court to endorse the doctrine of *Hall v. Williams*, after it had been so vigorously assailed by Mr. FREEMAN, must be taken as indicating a readiness to reject it when the point comes before them again.

Since that decision, so significant in its silence on the question, it may be said with some confidence that the "entirety" doctrine is not now accepted as law, except in Massachusetts, Maine, New Hampshire, and Maryland, and perhaps in New Jersey.<sup>1</sup>

<sup>1</sup> In *Black on Judgments*, § 211, *Brockman v. McDonald*, 16 Ill., 112, and *Hulme v. Jones*, 6 Texas, 242, are cited—and the second case is also given in *Freeman*, 4th Ed., § 136—as supporting the "entirety" doctrine. We think, however, that these decisions, the first of which does not rely upon any of the "entirety" cases, and the second of which cites no decisions at all, are not properly to be so understood, but that they merely illustrate the confusion (which Mr. Freeman has pointed out) caused by the failure to discriminate between judgments which were void *ab initio*, and those which are only irregular enough to be reversed on appeal, and by the use of terms as applicable to both classes of cases which properly are only applicable to one class. The cases of *Williams v. Chalfant*, 82 Ill., 218, and *Harvey v. Drew*, 82 Ill., 606, would seem to show that the Supreme Court of Illinois can so discriminate. The expression in the last case (which we will not discuss): "No doubt it was a valid judgment against [A]" may probably be taken as showing that that court follows the prevailing doctrine of the separableness of judgments.

Mr. Freeman cites *Martin v. Williams*, 42 Miss., 210, as committing the Supreme Court of that State to the "entirety" doctrine. We think that *Moody v. Lyles*, 44 Miss., 121, and *Terry v. Curd, etc. Co.*, 66 Miss., 394, might quite as appositely be cited to show that that court can make the distinction between void judgments and judgments against two which are only irregular and reversible. In that State there seem to have been an unusual number and variety of more or less defective or irregular judgments against two or more in the lower courts, which came up to be considered by the Supreme Court.

*Parisot v. Green*, 46 Miss., 747, is something of a legal curiosity. Supplies having been furnished to a steamboat, the plaintiffs—their counsel having a vague kind of horse-marine notion of admiralty floating

The position of New Jersey on the "entirety" question is a peculiar one. The first case is *Schuyler v. McCrea*, decided in 1837:<sup>1</sup> A judgment rendered against two, when only one was summoned, is not a void but a valid judgment until reversed; and in *Silvers v. Reynolds*<sup>2</sup> the Supreme Court of that State, citing *Motteux v. St. Aubin* and *Gerard v. Basse*, *supra*, decided that a judgment might be set aside as to one of two defendants and stand good as to the other. But the case of *Mackay v. Gordon*,<sup>3</sup> action of debt on a New York judgment in which neither *Silvers v. Reynolds* nor *Schuyler v. McCrea* is cited, seems to range the New Jersey court on the side of the *Hall v. Williams* doctrine. The later case, however, presents the curious fact that *Hall v. Williams* and *Reed v. Pratt*,<sup>4</sup> which seem to be the very antipodes of each other—are cited on the same point, in immediate juxtaposition, and with *equal approval*. One would have supposed that *Reed v. Pratt* would be conclusive in a suit on a *New York judgment*. Further, in discussing the demurrer to the second plea, which raised the "entirety" point, while the court indicated its approval of that doctrine, it yet decided the demurrer to that plea adversely to the defendants, because of what the court regarded as a defective way of presenting that plea, and finally reached a decision in

in their minds—sued, in *assumpsit*, in the county court, the two owners *and the boat*. Judgment rendered against the two human defendants. Afterwards a suit in chancery to enjoin sheriff and creditors on the ground that the judgment was void, because (1) the suit *ought* to have been *in rem* (?) in admiralty, and (2) because of the irregularity arising from the *joinder of the boat*! The court discusses the case, and the contention of void-as-to-one-void-as-to-all, with more gravity than might have been expected, although remarking that "the allegation that the steamer 'R. E. Hill,' with Parisot and Dent, were indebted, and the defendants promised to pay, may excite a smile." The opinion mentions "the case referred to in 11 N. H." (sic)—evidently *Rangely v. Webster*, 11 N. H., 299, not mentioned before, which quotes and follows *Hall v. Williams*—but neither the adherents of the "entirety" doctrine nor its opponents are likely to derive much aid from this decision.

<sup>1</sup> 1 Harr., 248.

<sup>2</sup> 2 Harr., 275 (1839).

<sup>3</sup> 34 N. J., 286 (1870).

<sup>4</sup> 2 Hill, 64.

defendants' favor by overruling the demurrer to *another* plea raising a different defense. In view then of the fact that the decision of the "entirety" question does not seem to have been necessary to the case, and in view, further, of the court's silence about *Silvers v. Reynolds*, and *Schuyler v. McCrea*, and of the citation of such conflicting decisions from other States, it is perhaps best to class New Jersey as a State in which the point is still in doubt, rather than with the three New England States and Maryland. There is a mistake at the end of the report of *Mackay v. Gordon*, where judgment "for the plaintiffs" should be "for the defendants."

The consequences of the "entirety" doctrine being still upheld in four States, will be as follows: When next an action of debt on judgment is brought, say in Connecticut for example, against A the summoned defendant, there having been also an unsummoned defendant B, against whom judgment was also rendered, then *if the judgment was rendered in Massachusetts* (etc.), the plaintiff cannot recover because the judgment was a nullity there, as the authorities will show, but if the judgment was rendered in New York, Virginia, Missouri (etc.), or in Ontario, the plaintiff will recover because, as the authorities will show, his judgment was valid in the home tribunal. Or to put it in another way, on such a judgment, if it was a New York judgment, the plaintiff can recover against A anywhere, even in Massachusetts, but if it was a Massachusetts or a Maryland judgment, he cannot recover in New York or anywhere else. As to States "not heard from," that is to say States where their highest courts have never had occasion to decide the "entirety" point one way or the other—and supposing for the sake of example that Idaho and Montana are two such "doubtful States"—on such an Idaho judgment against A (and B who was not summoned) the plaintiff would probably recover in an action on the judgment brought against A in Montana, because we must suppose that the Montana court would presume that the Idaho court *would* hold to be the law what is now shown to be supported by the weight of authority.

Would hold to be THE LAW; that is to say not *statute* law, of course, but *evolved* law, a proper result of the principles of the common law. Some of the New England cases are very misleading in their way of speaking of what is "the law," and of how proof should be given of what is "the law" of the State from which the judgment against A (summoned) and B (not summoned) has come. They assume very erroneously that "the law" in that other State cannot possibly be directly the opposite of their own "entirety" law without being the creation of statute, but the fact is that "the law" of (say) New York or Missouri on that subject, as of Ontario, was evolved, and needed no statutes to help it into being. The New York Supreme Court is so well satisfied with the justice of the doctrine it holds as to say (Reed *v.* Pratt,<sup>1</sup>) that it "would be to legalize the grossest iniquity" if the defendants who had authorized an attorney to appear for them were allowed afterward to escape because their co-defendants had not appeared, and it may be supposed that that court would find it easy to hold, *à priori*, that the "entirety" doctrine could never have been evolved—that such law must have been created by statute! It is quite possible that in three of the New England States and in Maryland the courts would still presume that the yet unevolved, or at least undeclared, law of any "doubtful State" must be the same as their own. But of course if the summoned defendant admits, as in the case of Hanley *v.* Donoghue, he did admit by demurrer, that "by the law" of the State where the judgment was rendered it was a good judgment there against him, the admission is just as fatal to him whether the court takes that admission to be *by the statute law* or *by the law as evolved and decided*.

The assumption that "the law" of another State cannot be different from the "entirety" doctrine of Hall *v.* Williams unless it had been made so different by statute, is rather strikingly exhibited in Knapp *v.* Abell, *supra*. Here judgment had been rendered in New York against A (sum-

<sup>1</sup> 2 Hill, 64.

moned) and B (not summoned) and the Massachusetts court decided that "the judgment [against A] was wholly void for want of service upon the other defendant," citing *Hall v. Williams*, *supra*, and *Rangely v. Webster*;<sup>1</sup> and after speaking of the absence of proof of "the statutes of New York," the court says: "We cannot judicially know or presume that the law of New York upon this point differs both from the common law and from our own." But if the court had known of the case of *Motteux v. St. Aubin*, and of *Reed v. Pratt*, and other New York cases, *infra*, they might have seen how the law—the *common* law—of New York could not only differ from their own, but also could in so differing be based upon very good authority.<sup>2</sup>

It is a rather curious circumstance also that the case of *Wright v. Andrews*, *supra*, was a suit on a *Maine* judgment rendered against A who had employed counsel, and B who had not. The conclusion of the brief decision is that the "judgment, being entire and unqualified, is, *in the absence of any evidence of the law of Maine upon the subject*, void against both." But Maine was one of the three States which had accepted the "entirety" doctrine, *Buffum v. Ramsdell*,<sup>3</sup> and the mere citing of that case would have been enough to show that *the law* of that State was the same as that of Massachusetts.

The decision of the Supreme Court in *Hanley v. Donoghue* is also, we think, misleading in its way of speaking of what is "the law"—or "the laws"—and of how proof should be given of what is "the law"—or "the laws"—of the State whence comes the irregular judgment.

The second count of the declaration, after setting forth the judgment against A (summoned) and B (not summoned), "as by the record [etc.] appears, which said judg-

<sup>1</sup> 11 N. H., 299 (1840).

<sup>2</sup> It is true that there were from an early day statutes in New York authorizing the rendition of judgments against unsummoned co-defendants, joint obligors, etc., but the doctrine of the separableness of a judgment existed in that State independently of statute.

<sup>3</sup> 55 Maine, 252 (1867).

ment" [remains in force and unreversed, etc.], proceeded : "whereby an action hath accrued to the said plaintiffs to demand and have of [A] the said sum of money," etc. The third count was like the second except for a parenthetical clause inserted : "whereby—in view of the fact that by the law and practice of Pennsylvania, the judgment so rendered against the two [etc.] is in that State valid and enforceable against [A] and void as against [B], and in view of the fact that [the time allowed for an appeal had gone by]—an action hath accrued,"<sup>1</sup> etc. By demurring to this count the defendant admitted the truth of what was there alleged, and as we have just said, the admission was fatal to him whether he meant to admit that it was by the *statute* law or by the *common* law of Pennsylvania that the judgment was valid and enforceable.

But did he not also by demurring to the *second* count make an equally fatal admission? "Whereby an action hath accrued," etc. "*Whereby*"—that is to say "as a legal result whereof," *because* that Pennsylvania judgment was, according to sound principles of *law* as declared in decisions of authority, not an "entirety," but a separable thing, good as against A although void as against B. The demurrer must be held to have admitted this proposition also. In other words, while the federal question—"full faith and credit"—was raised with equal distinctness by both counts, as demurred to, the question of the soundness or unsoundness of the "entirety" doctrine was raised more distinctly by the demurrer to the second count, not discussed by the court, than by the demurrer to the third. It would seem that a distinct utterance on this question would have been more appropriate than the statement<sup>2</sup> of the familiar doctrine—and citation of authorities in support of it—that the courts of this country will not take judicial cognizance of foreign laws, such as the edicts of the crown of Portugal (*Church v. Hubbard*),<sup>3</sup> or of the laws and usages

<sup>1</sup> Brackets [ ] are used above to indicate abbreviations made for the sake of greater clearness.

<sup>2</sup> 116 U. S., p. 4.

<sup>3</sup> 2 Cranch, 87.

of Turkey (*Dainese v. Hale*),<sup>1</sup> but that such foreign laws "must be proved before they can be received in a court of justice," also that "the several States of the Union are to be considered as in this respect foreign to each other," etc. The summoned defendant having by his demurrer to the second count impliedly admitted that according to principles of *law*—and nothing said there about *statute* law—the judgment was good against him, one would have expected the court to say in so many words whether what was thus admitted to be the law in Pennsylvania was local and eccentric, and different from the law as generally received—then and there taking occasion to assert the soundness of the doctrine of *Hall v. Williams*—or whether what was thus admitted to be good Pennsylvania law was also elsewhere and generally received as good law—then and there taking occasion to assert the soundness of the doctrine of *Motteux v. St. Aubin*, and of the cases decided in New York, Missouri, etc., and in Ontario.

It is the more to be regretted that the Supreme Court did not express its approval or disapproval of the "entirety" doctrine, inasmuch as the singular fact presents itself that in none of the cases which declare it, until we come to *Hanley v. Donoghue*<sup>2</sup> (except in *Mackay v. Gordon*; *supra*), is there any mention of any of the opposing decisions, and in none of these is there any mention of the "entirety" cases.<sup>3</sup>

In the New Jersey decision, *Hall v. Williams* and *Reed v. Pratt* are cited on the same point with equal approval, as we have already said, and with no attempt to reconcile them, or to discriminate between them. In New York the decisions are, as Mr. FREEMAN says,<sup>4</sup> "irreconcilable, but with the majority in number against" the entirety doctrine. The first case, *Green v. Beals*,<sup>5</sup> quotes

<sup>1</sup> 91 U. S., 13.

<sup>2</sup> 59th Md.

<sup>3</sup> The Mississippi case cited above in a foot-note can hardly be considered an exception.

<sup>4</sup> 32d American Decisions, p. 606.

<sup>5</sup> 2 Caines, 254 (1804).

and sustains *Motteux v. St. Aubin*, and it is relied upon and followed in *Crane v. French*.<sup>1</sup> Then comes *Holbrook v. Murray*,<sup>2</sup> which, without mentioning these cases, adopts the "entirety" doctrine of *Hall v. Williams*, and then come *St. John v. Holmes*,<sup>3</sup> *Reed v. Pratt*,<sup>4</sup> and *Brittin v. Wilder*,<sup>5</sup> which, without mentioning *Holbrook v. Murray* or *Hall v. Williams*, bring the law back to where it was before, in line with *Motteux v. St. Aubin*.

When the case of *Hanley v. Donoghue* was argued in the Supreme Court, the latest case cited opposed to the *Hall v. Williams* doctrine was *Holton v. Towner*,<sup>6</sup> and there is a still later Missouri case cited in the 4th edition of *Freeman on Judgments*, *Williams v. Hudson*;<sup>7</sup> and now the very latest case on the subject (we believe) is again from that State, *Boyd v. Ellis*.<sup>8</sup> It will be interesting to mention these three cases briefly one after the other, as they illustrate very well the fact that this principle of void-as-to-one-but-not-as-to-another applies to a whole class of cases, not merely to the case where one was summoned and the other not. *Holton v. Towner* decides that a judgment rendered jointly against a married woman and others who are *sui juris* is not, as to the latter, void and collaterally assailable, although as to the married woman it is a nullity. *Williams v. Hudson* decides that a judgment in a suit commenced and prosecuted against a person deceased is void as to him, not void as to living defendants. *Boyd v. Ellis* decides that a judgment against two persons, one served with process and the other not, is valid as against the one served. Add to these the leading case of *Motteux v. St. Aubin*, where one of the defendants was an infant, and *Gerard v. Basse*—where judgment was entered on a bond and warrant to confess judgment, executed by one partner with one seal, in the name and behalf of both, and on motion the judgment was set aside as to the partner who did not sign, but held valid as to the other—and we

<sup>1</sup> 1 Wend., 311 (1828).

<sup>3</sup> 20 Wend., 609 (1839).

<sup>5</sup> 6 Hill, 242 (1843).

<sup>7</sup> 93 Mo., 524 (1887).

<sup>2</sup> 5 Wend., 161 (1830).

<sup>4</sup> 2 Hill, 64 (1841).

<sup>6</sup> 81 Mo., 360 (1884).

<sup>8</sup> 107 Mo., 394 (1891).

believe that all the important phases are presented of irregularly rendered judgments voidable (or void) as to one, while valid as to another.

To sum up the States whose highest courts are opposed on the "entirety" doctrine, we have on the one side Massachusetts, Maine, New Hampshire, Maryland, and, perhaps, New Jersey; on the other, Arkansas, Georgia—perhaps Illinois—Iowa, Kentucky, Missouri, Nebraska, New York, Ohio, Pennsylvania, Tennessee and Virginia.<sup>1</sup> The cases themselves—except a few of those mentioned in this article—may be found in Black on Judgments, and in the last edition of Freeman on Judgments.

The position of Ontario on this question, which is the same as that of the States last mentioned, may be learned from *Bacon v. McBean*.<sup>2</sup> Suit on a New York judgment against A and B. Plea that B had not been summoned. The court (Queen's Bench) decided, per ROBINSON, C. J.: "The plea sets up as a defense for the defendants a matter which only concerns one of them," and gave judgment for the plaintiff.

There are cases in the English reports of suits on foreign or colonial judgments, but none where the judgment had been rendered against two defendants, one of whom had not been summoned, and we can only suppose that when such a judgment comes up, the doctrine of *Motteux v. St. Aubin* will be applied to it.<sup>3</sup>

<sup>1</sup> *Quære*: Ought we not to add to these last every State whose highest court, when one of these good-as-to-one-bad-as-to-another judgments came before it on appeal, merely *reversed* the judgment for the irregularity, without in terms declaring its adherence to the "entirety" doctrine, for if the judgment was already an absolute nullity as to both, *what was the use of appealing?* If so, probably all or very nearly all, of the other States would be found ranged against the four or five.

<sup>2</sup> 3 U. C. Q. B., 305 (1847).

<sup>3</sup> The question suggests itself whether a judgment mistakenly rendered against A, and B who was not summoned, so far merges the original cause of action as to constitute a defense to a suit brought on such cause of action in another State. It may arise when such suit is brought (1) against A; (2) against B; (3) against both. It would seem that such defense should be held good if such suit is brought against A, probably, also, if it is brought against both, but that it should not be held good if suit is against B alone.